

INTERPRETATION STATEMENT: IS 19/04

INCOME TAX – DISTRIBUTIONS FROM FOREIGN TRUSTS

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in Appendix B to this Interpretation Statement.

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Scope of this statement

1. This Interpretation Statement considers the income tax treatment of amounts of money or property transferred to New Zealand resident taxpayers by a person overseas, including through inheritance. It addresses how to determine whether the person who transfers the money or property is a trustee of a trust and when a taxpayer will have derived either beneficiary income or a taxable distribution from a foreign trust.

Key terms

2. This item discusses issues using several terms that may be unfamiliar to some readers. The following brief glossary is intended to assist by describing a few of these terms in a general way:

Administrators are appointed by the court to administer an estate.

Assent describes what occurs at the point of administration of an estate when, either expressly or by implication, personal representatives accept that estate property can be distributed or should be held on trust.

Bare trust is a trust where the trustee has no duties to perform (aside from guarding the property) beyond transferring trust property to a beneficiary when required to do so. A bare trust is treated in the same way as a nominee for tax purposes.

Beneficiary income is income derived by a trustee but vested in or paid to a beneficiary in the same year or soon after.

Civil law countries have legal systems based on Roman civil law or law other than English law.

Common law countries are countries where the legal system is based on English law rather than Roman civil law or other law.

Corpus is the value (at the time of settlement) of property settled on a trust.

Executors are appointed by a testator (a person who makes a will) to carry out the instructions in the will.

Foreign trust means a trust that has had no New Zealand resident settlor.

Non-discretionary trust is a trust where trustees have no discretion as to various matters for distributions to beneficiaries.

Ordering rules are the rules in s HC 16 that specify what various elements of a distribution are to be treated as consisting of and in what order.

Personal representatives are executors or administrators.

Settlor is someone who transfers value to a trustee.

Taxable distributions are transfers of value to beneficiaries by trustees of foreign and non-complying trusts other than of things listed in s HC 15 (such as beneficiary income and corpus).

Trust is not a description of an entity but a description of an obligation on someone to hold property for beneficiaries or objects (as discussed in this item).

Trustee income is income derived by a trustee that is not beneficiary income.

Summary

3. New Zealand residents are generally liable to income tax on income derived from sources in New Zealand and worldwide. Their assessable income includes money or property transferred to them by someone offshore as “beneficiary income” or a “taxable distribution from a foreign trust”.
4. Both concepts require that the money or property comes from a “trust” as that term is interpreted for New Zealand tax law purposes. It follows that the person transferring must have held the money or property according to arrangements where the essential features of a trust under New Zealand law are present. The money or property must have been held by the person as trust property with an equitable obligation to deal with it for the benefit of a person or charitable object. Whether such an obligation exists turns on there being circumstances that give rise to something that would be within the concept of a trust were the issue to be decided under New Zealand law. Wherever in the world property is situated, if the legal basis on which it is owned or controlled and the surrounding circumstances are such that there are obligations that New Zealand law would recognise as trust obligations, then there is a trust. This is the case whether the law of another country would recognise the situation as a trust or not and whether the trust law of another country is the same as trust law here or not (see [27]–[29]).
5. Where a trust exists (unless it is a “bare” trust – see [188] to [195] below), a distribution from it will be “beneficiary income” if it is current year income derived by trustees but paid to a beneficiary in the income year (or within the extended time period provided by s HC 6(1B)).
6. For an amount that is not beneficiary income to be a “taxable distribution from a foreign trust”, the trust must have had no New Zealand settlor and the transfer must amount to a “taxable distribution”.
7. A transfer to a person as beneficiary of a foreign trust is a taxable distribution (unless it is current year income) if it is not within an exception in s HC 15(4) (such as for corpus and certain capital gains). However, the ordering rules in s HC 16 (see [131]) may apply and may override what would normally be the character of components of the distribution based on the terms of the trust or the description given of the distribution by the trust. To apply the ordering rules, good financial records for the trust are required, and the onus will be on the beneficiary to obtain that information.
8. An important exception to the requirement to apply the ordering rules is for distributions from non-discretionary trusts created by will or arising after intestacy (see [133]).

9. Where the money or property transferred to a resident is an inheritance, it may be subject to tax if a foreign trust arises following administration of the deceased's estate. This is unlikely to be the case (although it is possible) where the deceased was in a country that does not have the concept of a trust as part of its law. Where an inheritance does not come from a trust, there can still be New Zealand tax consequences for income that may be treated as derived by the inheritor from date of death because the law in the country concerned provides for immediate succession on death.
10. For estate administration in countries with legal systems like New Zealand's, once personal representatives have ascertained the property available for distribution (residue), they either transfer it to beneficiaries or they vest it in someone acting in the capacity of trustee. Until they have assented to such transfer or vesting, the personal representatives have the legal and beneficial interests in the property comprising the estate and any trust provided for in the terms of a will (a testamentary trust) or under the rules governing an intestacy will not arise.
11. Where executors are also sole trustees of a testamentary trust, the residue (or part of it) will vest in themselves following assent and they will hold it on trust and in their capacity as trustees. Where separate trustees are named, the equitable interest in the property vests following assent but executors must do what is necessary to transfer legal title to the trustees.
12. A bare trust may mark the interval between assent and any beneficiary under the will taking legal title. Where a trust following assent is a bare trust, there is effectively no trust for tax purposes.
13. In contrast, testamentary trusts can take the form of express trusts, life interests and minority interests (see [38]–[43]) and will not be bare trusts.
14. When a trust arises from a deceased estate offshore, as for other foreign trusts outside the context of deceased estates, amounts subsequently distributed to beneficiaries in New Zealand may be beneficiary income or taxable distributions. Such amounts derived by an individual will not have income tax deducted at source and so will not be "reportable income" included as pre-populated income information for the automatically calculated assessments made and included in the individual's tax return each year. It will need to be included separately as "other income" in the individual's tax return.

Introduction

15. In general terms, under New Zealand's approach to taxation, residents are taxable on their worldwide income, and non-residents are taxed on New Zealand-sourced income: s BD 1(5).
16. Beneficiary income and taxable distributions from foreign trusts are income of a New Zealand tax resident. Determining whether money or property transferred to a resident is subject to tax as beneficiary income or a taxable distribution is often not simple. It requires consideration of all the circumstances of the transfer to the resident and the possible application of rules (ordering rules) that can override what might appear otherwise to be the nature of the transfer.

17. Thought should be given to the possibility of income from a trust being derived whenever money or property has been transferred to a New Zealand tax resident by someone who is a non-resident. Trust income can arise wherever in the world the money or property may be situated and in a wide variety of trust arrangements. For example, taxable amounts might be received from a trust established by a relative who has never had any connection to New Zealand, or they might come from a trust settled offshore before a resident migrated to New Zealand. Trust income may arise when it is not immediately obvious that an amount has come from a trust.
18. Sometimes the result can be tax on distributions of assets from the overseas estate of a deceased person to a beneficiary of the estate. It does not necessarily follow from money or property being inherited and received from someone overseas that there is no tax liability. It also makes no difference that something might be described as a “gift” or a “bequest”.
19. Whether an amount is taxable can be difficult to determine and may depend on information that is hard for taxpayers to obtain. The tax treatment of amounts can depend on activity by the trustees since the trust began, and inadequate records of this activity can have the consequence of a distribution being treated as taxable (s HC 15(7) – see [135]). Further, the introduction of Common Reporting Standard and Automatic Exchange of Information arrangements means Inland Revenue is likely to have more information than it had in the past about amounts that are transferred to New Zealand tax residents from offshore trusts. The Commissioner, therefore, considers the guidance in this Interpretation Statement will be both useful and timely.
20. Note that this Interpretation Statement is not specifically concerned with trusts that might be affected by the foreign trust registration and disclosure requirements introduced early in 2017 (s 59B of the Tax Administration Act 1994 and s HC 26 of the Income Tax Act are the main provisions), which are often referred to as “New Zealand foreign trusts”. They are a subset of foreign trusts that have a non-resident settlor, have at least one New Zealand resident trustee and enjoy an exemption from tax on foreign-sourced trustee income under s HC 26. The connection to New Zealand of most of this subset of trusts is simply having trustees here, so few are likely to make distributions to New Zealand residents. However, a distribution by such a trust to a New Zealand resident is covered by the discussion in this Interpretation Statement.

Discussion

Taxing beneficiary income and taxable distributions

21. This Interpretation Statement concerns the tax rules that apply when a New Zealand tax resident inherits or receives a distribution of money or property from someone overseas.
22. The money or property may be in New Zealand or in another country but if the transfer of money or property is from a trust, a potential tax liability arises for the New Zealand resident.
23. The tax rules applicable are discussed in more detail in Appendix A, but the tax liability will arise because the resident derives income in the form of beneficiary income or a taxable distribution.

24. Whether amounts are beneficiary income or taxable distributions depends on establishing whether the money or property comes from a trust.

Whether an arrangement is a “trust”

25. It will not always be clear that money or property is transferred from a trust.
26. Often, there will be a trust deed and an acknowledgement by the person who transfers property that they are transferring as a trustee. This acknowledgment will usually indicate the existence of a trust and the making of a distribution by a trust.
27. However, there may be circumstances creating doubt that the transfer is from a “trust”. For instance, some countries (such as civil law jurisdictions like France and Germany) do not have the legal concept of a trust. Also, some countries do not have the same laws concerning the establishment and validity of trusts or the administration of estates as we have in New Zealand.
28. Situations like this make it important to understand what is meant by the word “trust”.
29. Where the issue is whether money or property transferred to New Zealand residents by trusts should be treated as income, the starting point will be the application of the trust rules in the tax legislation. These rules apply where a “trust” exists. The question is the interpretation to be given to the word “trust” in the legislation.
30. For reasons set out in more detail in Appendix A (see [96]–[122]), it is considered that the word “trust” in tax law has the meaning that it has under New Zealand general law. This meaning is that a trust is not an entity but a description of an equitable obligation the law imposes on a person holding property to deal with that property in a certain way; namely, for the benefit of beneficiaries or a charitable purpose. Circumstances will be found to give rise to a trust only where there is such a person (the trustee(s)), property that can be the subject of the trust, someone (one or more beneficiaries) for whose benefit the property is held and where the law imposes the required obligation. It is an objective exercise to determine whether a trust exists and a court is likely to take account of the provisions of the Trusts Act 2019 which is intended to align with common law and equity while not being a code.
31. Money or property transferred to a New Zealand resident will, therefore, come from a trust when there exists an arrangement, the true nature of which is that the person transferring had a fiduciary obligation to hold property for the benefit of a person or an object. Whether such an obligation exists, turns on there being circumstances that give rise to something that has the essential features of a trust under New Zealand law; namely that a person (trustee) holds trust property and has an equitable obligation to deal with the property for the benefit of the beneficiaries or for a charitable purpose. Wherever in the world property is situated, if the legal basis on which it is owned or controlled and the surrounding circumstances are such that there are obligations that New Zealand law would recognise as trust obligations, then a trust exists for tax legislation purposes.

32. Under the laws of countries like Australia, the United Kingdom and Canada, what amounts to a trust is very similar to the position in New Zealand. However, a trust may exist whether the law of another country would recognise the arrangement as a trust or not and whether the trust law of another country is the same as trust law here or not. The law of trusts varies between countries, so where the circumstances are such that they would give rise to a trust that is valid in another country under that country's law but that arrangement would not be a trust under New Zealand law, the trust rules will not apply. It is also possible that an arrangement may be considered a trust for New Zealand tax purposes and not be considered a trust under the laws of another country. This may be the case despite the concept of trusts not even being part of the law of such a country, as is the case for civil law countries.

Deceased estates – when an inheritance will be a distribution from a trust

33. A New Zealand resident inheriting money or property on the death of someone overseas will often not have a tax liability for having derived beneficiary income or a taxable distribution from a trust. There may be several reasons for this.
34. First, no part of an inheritance may be a distribution from a trust because the administration of the estate does not give rise to a trust that includes the money or property in question. Or, secondly, as discussed from [175], money or property often ends up being held on a "bare trust" that will not be recognised as a trust for tax purposes. In that situation, income generated by the property while held on bare trust will be treated as income of the beneficiary, but the transfer of the property itself will not give rise to a tax liability under the trust rules.
35. Further, and even if the inheritance is received from a trust arising in the administration of a deceased estate, it may not be a taxable distribution when the trust rules are applied. Perhaps the ordering rules do not apply or, if they do apply, the ordering rules do not require the distribution to be treated as taxable.
36. However, an express trust may be provided for in a will or contingencies may give rise to a trust in some circumstances. Such a trust arising in the administration of the estate of a deceased person overseas means a possible tax liability for a person receiving a distribution.
37. A trust arising in the administration of an estate is a trust that the trust rules apply to in the same way as any other trust. It follows that when a New Zealand tax resident receives or becomes entitled to money or property from an executor or administrator (personal representative) of a non-resident deceased person's estate, an important question is whether the personal representative is distributing as a trustee of a trust.
38. Just as when any property is transferred by someone overseas to someone in New Zealand, it is important to identify whether the circumstances are such that the estate property is held on a trust, whether this is a foreign trust and whether the distribution is a taxable distribution or beneficiary income.
39. As to whether the estate is held on trust, that will be when the legal basis on which what is distributed is owned or controlled and the surrounding circumstances are such that there are obligations that New Zealand law would recognise as trust obligations.

40. In the context of deceased estates, whether a trust exists will turn on the basis on which the personal representatives in question hold the estate and make the distribution. Estate administration laws can determine that basis, so whether circumstances exist that they would give rise to a trust under New Zealand law will depend to some extent on what the estate administration laws of the other country are.
41. In New Zealand, on a person's death, personal representatives acting in that capacity have the legal and beneficial interest in the estate property and do not hold the estate on trust for heirs. For reasons discussed in Appendix A (see from [142]), in New Zealand a trust arises in the administration of an estate only once the personal representatives have given "assent" in relation to the property. An equitable obligation amounting to a trust, therefore, arises only following assent by the personal representatives to the property in question being held on trust by a trustee or trustees. Such assent can be express or inferred from the circumstances.
42. Even then, unless distributions are from trusts expressly provided for in a will, they may be by personal representatives holding on a "bare trust" (discussed from [175]) and will not be taxable distributions for that reason.
43. Common law countries such as Australia, the United Kingdom and Canada are likely to have similar estate administration laws to those in New Zealand. Trusts are, therefore, also not likely to arise until assent of personal representatives where an estate is administered in those countries. In situations such as heirs not being of age or a will providing for a life interest before distribution of property to heirs, where delays in distribution follow assent by personal representatives and property is not held on a bare trust, subsequent transfer to beneficiaries in New Zealand may be a taxable distribution.
44. Uncertainty around when the role of a personal representative becomes the role of a trustee will make the tax law difficult to apply in many situations. When a trust arises depends on the time of assent. That may not be easy to determine because there is no requirement (or general practice) to formally and expressly assent. It will often be a matter of inference from the circumstances. Once assent has occurred, estate property that continues to be held undistributed will be held on trust, with potential tax consequences if the trust is not a bare trust (see from [180]).
45. Distributions from estates of residents of civil law countries such as France, Germany and Switzerland are less likely to be from trusts. The general position in such countries is that heirs directly succeed to property on death and have a legal interest from that time. Personal representatives do not distribute anything to heirs that they do not already own. That does not mean the heirs can have no tax liability, they can still have New Zealand tax to pay on any income derived from their share of the estate. For example, interest from loans or rent from rental properties would be derived by the heirs as owners from the date of death. This may raise compliance (plus interest and possible penalty) issues in practice as heirs may not be aware of the details of their income until much later. Also, possible application of double tax agreements and foreign tax credits would be relevant to calculation of the tax liability. However, distributions will not be beneficiary income or taxable distributions from a trust unless the circumstances otherwise give rise to a trust.
46. In summary, a New Zealand tax resident will not derive anything that will be beneficiary income or a taxable distribution from a foreign trust unless:

- for common law countries, administration of an estate has at least reached the stage that personal representatives have assented to the property being held on trust; or
- for civil law countries, something has happened to the property before transfer to the resident that New Zealand law would consider gives rise to a trust (for instance, the property was transferred to someone in another country (a common law country) to hold on trust for the resident in New Zealand - a distribution made direct to the resident would not be a distribution from a trust).

Examples

47. The following seven examples help to explain the application of the law. Some of the discussion is based on the analysis covered in Appendix A, which follows the examples.

Example 1: Whether there is a trust – United States “trustee” sends money to New Zealand tax resident

48. Adam is a wealthy United States (US) citizen. Five years ago, he set up a “living trust”, a common estate planning method in the US. He appointed himself trustee, and the trust deed recorded that the trust was revocable during his lifetime but would become irrevocable on his death. Until then, income from the property, if distributed, must be paid to him and nobody else. The property must be held in the trust, but he is able to have it transferred to him if he chooses or to any other person. Further, one provision in the trust deed allows Adam to absolve himself as trustee from any breaches of trust.
49. As trustee, and without breaching the income distribution clause, he sends some money to his son Orson who lives in New Zealand. The money is intended to be used by Orson to set up a business here. Orson wonders if the money is taxable in New Zealand.
50. Orson is a New Zealand tax resident, and there has been a transfer of value to him. However, he would, arguably, not derive a taxable distribution from a foreign trust. This is because the money may not have come from a trust. While Orson’s father’s revocable trust is a valid trust for the purposes of US law (although looked through for US tax purposes), the law of New Zealand would not necessarily recognise it as a valid trust. While Adam is alive, the essential features of a trust under New Zealand law are not present. This is not because the arrangement is “revocable” by Adam. Under New Zealand law, a valid trust can include one that may be brought to an end at any time. Instead, the important consideration on these facts is that, as trustee, Adam can effectively make a final distribution of all property held, he cannot effectively be called to account, and he did not intend to create a trust that would divest himself of the property in his lifetime.
51. The amount Orson received would be treated for New Zealand tax purposes as a gift, from his father in the US, from amounts that would have previously been taxed in the US to his father, if they were taxable there. Nothing in the facts suggests the amount is of an income character and subject to New Zealand tax in Orson’s hands.

Example 2: Whether there is a trust – property held in Switzerland transferred to New Zealand tax resident

52. Carl has lived in Switzerland all his life and has accumulated several properties that he decides to dispose of. One is an apartment in Zurich that he wants to keep in the family, so he transfers it to his brother Roger and they sign an agreement that Roger is responsible for maintaining it and meeting outgoings and can live in it or rent it out in the meantime but would transfer the apartment and any accumulated rental income to Carl's daughter Ursula when she turns 25. In the event of Ursula dying before she turns 25, Roger is to give the apartment and accumulated rental income to his own children.
53. Ursula moves to New Zealand as a 20-year-old. Five years later (after she has lost her transitional tax resident status), and on the day she turns 25, Roger transfers title in the apartment to her. He received rental income on the apartment for three years, so he deposits that in her bank account in New Zealand.
54. The tax treatment of this for Ursula will depend on whether the arrangement between Carl and Roger has the essential features of a trust under the law of trusts in New Zealand. The full factual details would be needed to decide, but at first sight the obligations that Roger is under appear to be obligations that would be regarded in New Zealand as fiduciary in nature and there would be a trust under New Zealand general law, despite the arrangement being likely to be considered a contract under Swiss law.
55. Assuming the arrangement is a trust for New Zealand tax purposes, the ordering rules in s HC 16 would apply because although it is likely to be a non-discretionary trust, it was not created by will or on intestacy. Roger has kept very good records of his time owning the apartment, so the ordering rules would treat any current year rental income as beneficiary income (because it is income derived by the trustee and paid to Ursula), the apartment itself as corpus or capital gains (and so excluded by s HC 15(4) from being a taxable distribution) and the accumulated rental income as a taxable distribution (being income Roger, as trustee, derived in earlier income years).
56. Tax credits are potentially available for tax paid by Roger (if paid by deduction ie at source and not if paid by Roger as legal owner) in Switzerland to reduce Ursula's tax liability on current year income. Art 22(1) of the double tax agreement (DTA) with Switzerland would seem to permit a credit for Swiss tax paid by deduction or by Ursula against New Zealand tax payable on the rental income distributed as beneficiary income or derived after title is transferred to her. The mechanism is via the domestic provisions such as ss LJ 1 and LJ 2. There is however no express recognition of fiscally transparent vehicles in the DTA with Switzerland so if Roger was assessed for Swiss tax then arguably it would not be treated as Ursula's tax liability under that DTA.
57. No tax credits would be available for tax paid on Roger's accumulation of rental income for previous years as a trustee. This would be treated as a taxable distribution if distributed in a lump sum to Ursula after her transitional resident status had ended. Under s LJ 6 only any tax equivalent to Non-Resident Withholding Tax deducted in Switzerland from a taxable distribution would be available as a credit in New Zealand.

58. If the arrangement is not a trust, the transfer of the apartment and any rental income accumulated by Roger before Ursula turned 25 would likely not be treated as income in New Zealand. These two items would essentially be treated in the same manner as gifts. Because the facts do not suggest Roger is an agent for Ursula at any stage, current year rental income derived before Ursula was 25 would also not be taxable in New Zealand.

Example 3: Ordering rules

59. In 2008, Charles, a celebrity chef, and Joanna, a successful banker, in the City of London, settle an investment portfolio and a house in the Cotswolds on a trust for their two children, Mary and Elizabeth.
60. In 2010, Mary moves to Australia. In 2012, Elizabeth moves to New Zealand, becoming resident here. Using the discretion given in the trust deed for the trust, in 2018 the trustees transfer the portfolio and accumulated income to Mary in Australia and the house to Elizabeth in New Zealand.
61. Although it is a discretionary trust, the trust is not a testamentary trust or created on intestacy so the tax treatment of the distribution for Elizabeth in New Zealand is going to depend on the application of the ordering rules in s HC 16. This means that Elizabeth will not be able to treat the distribution of the house to her as all being corpus and capital gains but must take account of the components of the investment portfolio. A proportion of the accumulated income in the portfolio would need to be treated under s HC 16(2) as income that the trustee derived and would be a taxable distribution under s HC 15(4).
62. For how the proportion should be calculated, see examples 21–23 and associated commentary in *Interpretation Statement IS 18/01: Taxation of Trusts – Income Tax* (IS 18/01, Inland Revenue 2018).

Example 4: Overseas will trusts

63. David moved to New Zealand from Australia with his mother when he was 12. His parents had separated, and David was their only child. David's father Joe was killed in a mining accident when David was 18. Joe's will left David a specific legacy of a sum of money and a direction that a trust be created with the balance of his residuary estate (mostly comprising commercial properties in Perth) to be held by the trustee, accumulating rents and reinvesting until David turned 21.
64. David has now turned 21, and the trustee has sold the properties and sent everything to David in New Zealand.
65. Assuming the law of administration of estates in Australia not to be materially different to the law in New Zealand, the only tax implications for David when he receives the specific legacy will arise from the fact that the money in question effectively moved from Joe to David at the time of Joe's death (under the "relation back" principle). If Joe invested the money in Australia before sending it to David, income may have been derived that would be taxable to David in New Zealand. If not, it could be argued a bare trust briefly existed with the executors' assent inferred. However, the transfer of the specific legacy will not be recognised as a trust distribution for New Zealand tax purposes.

66. The distribution from the testamentary trust created from the residuary estate, on the other hand, is likely to have tax implications for David under the trust rules. Current year investment income of the trustee distributed to David will be beneficiary income. The trust will be a foreign trust because Joe has never lived in New Zealand and he is the only person who has ever settled anything on the trust. The ordering rules in s HC 16 do not apply, assuming the trust meets the requirements to be a non-discretionary trust. Therefore, the income treatment will be determined by the relevant deed or the trustees' determination. Accumulated rental and investment returns will be a taxable distribution, but the proceeds of sale of the properties will not, being excluded under s HC 15(4) as either corpus or capital gains.

Example 5: Deceased in a civil law country

67. Thomas has lived in Germany for most of his life. His only son Joseph moved to New Zealand in 2005. When his wife died in 2010, Thomas made a will leaving all his property to Joseph.
68. When Thomas passes away in 2016, Joseph travels to Germany and discusses Thomas's estate with the executor, Erich, a professional financial advisor in Berlin. Erich suggests it would be consistent with Thomas's wishes that Joseph does not take the inheritance to New Zealand straight away but keeps it overseas. Erich's advice is to appoint a company in the Cayman Islands to hold the estate on trust for Joseph's family until the trustee determines they need it.
69. Circumstances change and five years later Joseph's family is now short of money. The trust is wound up and everything is distributed to Joseph and his wife.
70. The tax effects of this for Joseph and his wife are very likely to be that they have derived beneficiary income and taxable distributions. Joseph may also not have been aware that, as a New Zealand resident settlor, he had an obligation to meet the trustee company's New Zealand tax obligations on trustee income (s HC 25) and to disclose under s 59(1) of the TAA the particulars of the trust. Further, amounts distributed that are taxable distributions will not be from a foreign trust, instead they are likely to be from a non-complying trust, meaning a greater tax liability for them. Although Joseph inherited the estate from a deceased person in Germany, a civil law country without trusts and where Joseph directly succeeded to the estate on Thomas's death, Joseph then settled on the Cayman Islands trust assets that had vested in him before the settlement. Joseph is a New Zealand tax resident, so the trust would be a non-complying trust and not a foreign trust (although an election to be a complying trust may be possible – see [8.33] of IS 18/01 and proposed amendments to s HC 33 in the Taxation (Kiwisaver, Student Loans, and Remedial Matters) Bill 2019). The same outcomes could be expected if Joseph had inherited the estate from a deceased person from a common law country.

Example 6: Non-discretionary will trust

71. Cindy moves to New Zealand in 2005 from Canada. Her parents die in a car accident in 2012 leaving wills under which their executors are instructed to establish a non-discretionary trust to hold their estate for their seven children, six of whom have remained living in Canada.

72. In 2018, Cindy receives a substantial payment from the trustees following the sale of some Canadian shares that were part of the estate at the time of her parents' death. The trustees sign a formal resolution to the effect that the proceeds of sale should be distributed to the beneficiaries.
73. Because it is a non-discretionary will trust, the ordering rules in s HC 16 do not apply, and the trustee resolution will determine the tax effect for Cindy. This means there is no taxable distribution to Cindy because the proceeds will be both corpus of the trusts established under the parents' wills and profits from realisation of capital assets (assuming the shares had increased in value since they were settled on the trusts).

Example 7: Discretionary will trust – ordering rules and the importance of records

74. As in Example 6, Cindy's parents die and leave wills, but this time the executors are instructed to establish discretionary trusts.
75. In 2018, Cindy asks the trustees for funds to support her daughter who is about to go to university. The trustees decide to sell some of the Canadian shares and distribute the proceeds to Cindy. They sign a formal resolution to this effect.
76. In this case, the result of the application of the ordering rules in s HC 16(2) may be that Cindy has received a taxable distribution. For this not to be the case, the records of the trust would need to show that there had been no income derived by the trustees in the current or earlier years that had not been distributed to beneficiaries earlier or at the same time. This is despite the distribution by the trustees being intended to be of corpus and capital gains.
77. Further, if Cindy cannot obtain adequate records to be able to determine the elements of the distribution under s HC 16(2), s HC 15(7) will apply to treat the entire distribution to her as a taxable distribution from a foreign trust.

Appendix A – Detailed analysis of applicable tax rules for distributions from foreign trusts

78. This appendix contains detailed analysis about the tax rules that apply when a New Zealand tax resident inherits or receives a distribution of money or property from someone overseas. A tax liability will arise because the resident derives income in the form of beneficiary income or a taxable distribution. Whether amounts are beneficiary income or taxable distributions depends on establishing whether the money or property comes from a trust.
79. All legislative references are to the Income Tax Act 2007 (the Act) unless otherwise stated. Relevant legislative provisions are reproduced in Appendix B.

Tax for New Zealand residents generally

80. This Interpretation Statement is concerned with the tax rules that apply to a New Zealand tax resident. The Commissioner's views on the test for whether somebody is tax resident in New Zealand are set out in *Interpretation Statement IS 16/03: Tax Residence* (IS 16/03, Inland Revenue, 2016).
81. A tax resident of New Zealand is generally liable to income tax in New Zealand on income derived from sources in New Zealand and worldwide. An exception exists for exempt income and excluded income (although excluded income can be taxable under other provisions such as taxable distributions from non-complying trusts: s BF 1(b)). However, for a New Zealand tax resident, if an amount is income, it will not generally make a difference to taxability that it comes from overseas.
82. Further, an amount may be income derived by a New Zealand resident regardless of whether the amount itself ever comes to New Zealand.
83. This principle of taxing the worldwide income of New Zealand tax residents includes income from trusts established overseas.

Taxation of income from trusts – overview

84. The laws dealing with trust taxation (referred to here, for convenience, as the trust rules) generally tax amounts derived through trusts as "trustee income" (taxable to trustees) as "beneficiary income" or as "taxable distributions".
85. Trustee income is income derived by trustees that is not beneficiary income. Whether an amount derived by a trustee is trustee income or beneficiary income depends (broadly speaking) on whether the amount is income retained by the trustees (trustee income) or income transferred to beneficiaries soon after being derived (beneficiary income).
86. New Zealand tax residents (other than "transitional residents") are taxable on beneficiary income from all trusts, whether the trustees derived the income from New Zealand or offshore. For transitional residents, foreign sourced beneficiary income is exempt income, that is, not taxable.
87. The trust rules classify trusts as complying trusts, non-complying trusts or foreign trusts. These classifications are relevant to determining whether distributions of amounts other than beneficiary income are taxable to New Zealand tax residents.

88. Distributions to beneficiaries of complying trusts, other than of beneficiary income, are not taxable income of a beneficiary.
89. Distributions to beneficiaries of foreign trusts, other than of beneficiary income, corpus (value contributed to the trust fund) or certain capital profits, are called taxable distributions. They are taxable income of the beneficiaries when derived, as is any beneficiary income. These distributions from foreign trusts (both taxable distributions and beneficiary income) are the focus of this Interpretation Statement.
90. In most cases, a trust is a foreign trust where no settlor (that is, anyone contributing value to the trust fund) has been resident in New Zealand at any time since a settlement was first made on the trust. In some circumstances trusts can be complying trusts as well as foreign trusts (such “dual status” trusts, are discussed from [8.47] of IS 18/01) and distributions from such trusts are not treated as taxable distributions.
91. Any trust other than a complying trust or a foreign trust is a non-complying trust. Beneficiary income from non-complying trusts is taxable, and distributions to beneficiaries, other than of beneficiary income and corpus, are also taxable distributions and are taxed at a penalty tax rate of 45%. Distributions from non-complying trusts are not the subject of this Interpretation Statement.
92. With some exceptions (see [133]), “ordering rules” override the nominal nature of distributions from foreign and non-complying trusts that would otherwise apply based on the trust deeds or the exercise of the trustees’ discretion. These are discussed in more detail from [132], but the ordering rules determine whether a distribution is treated, for tax purposes, as a distribution of income or capital gains of current or previous years or of corpus. They, therefore, determine whether a distribution will be a taxable distribution or not. For instance, the ordering rules mean current income is deemed to be distributed first, then retained income, capital gains and, lastly, corpus. This is regardless of what is stated in the trust minutes or records.
93. If the records of a foreign or non-complying trust do not allow for an accurate determination of the elements of a distribution (that is, current and previous years’ income or capital gains and the corpus), the distribution is treated as being entirely a taxable distribution.
94. A New Zealand resident beneficiary who receives beneficiary income or a taxable distribution from a foreign trust, including in some cases from an overseas estate, is required to complete a disclosure on Inland Revenue form IR307 Schedule of Beneficiary’s Estate or Trust Income for the income year in which they derive the distribution.

Taxing beneficiary income and taxable distributions

95. This Interpretation Statement is concerned with money or property that is distributed or transferred to a New Zealand tax resident (other than through a sale or purchase or other transaction where the resident gives something in return).
96. The money or property does not have to be in New Zealand. It can be located offshore, for example in a bank account in the United Kingdom or in the form of a holiday home in Australia.

97. Sections CV 13, HC 17 and HC 18 make beneficiary income and taxable distributions derived through foreign trusts “income”.
98. Under s CV 13, an amount derived is income if it is beneficiary income or a taxable distribution from a foreign trust:
- An amount derived by a person is income of the person if it is—**
- (a) **beneficiary income** to which sections HC 6 (Beneficiary income) and HC 17 (Amounts derived as beneficiary income) apply; or
 - (b) a settlement on trust of property of the kind described in section HC 7(3) (Trustee income); or
 - (c) **a taxable distribution from a foreign trust** to which section HC 18 (Taxable distributions from foreign trusts) applies. [Emphasis added].
99. Sections HC 17 and HC 18 confirm that beneficiary income and taxable distributions are income in the year they are derived.
100. Money or property, therefore, will not be taxable as beneficiary income or a taxable distribution from a foreign trust (or from a non-complying trust) if it did not come from a trust. For something to come from a trust, it must be established that the transfer is from something that amounts to a “trust” in terms of the use of that word in the Act.

Whether an arrangement is a “trust”

101. The word trust is not defined in the Act (other than in a limited definition in relation to superannuation schemes and unit trusts).
102. Section 5(1) of the Interpretation Act 1999 stipulates how statutes are to be interpreted:
- The meaning of an enactment must be ascertained from its text and in the light of its purpose.
103. The Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] commented on this:
- [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
104. In relation to the text, an important thing to consider is the natural and ordinary meaning of “trust”. The *Oxford English Dictionary Online* (accessed 10 December 2018) gives a few meanings but the only one that seems apt is the “law” meaning:
- an arrangement whereby a person (a trustee) holds property as its nominal owner for the good of one or more beneficiaries. ▪ A body of trustees.
105. The Trusts Act 2019 (the Trusts Act), which comes into force, for most purposes, from 30 January 2021, has a definition with more depth. This definition is regarded as consistent with the common law as it is currently but is not a codification of it.

106. Section 12 specifies that, among other things, an “express trust” is a “trust” that must have the characteristics set out in s 14. These are:
- (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
 - (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.
107. To be covered by section 12, an arrangement must be a “trust”, an undefined term in the Trusts Act. Also, although section 12 defines an “express trust”, it is only “for the purposes of [the Trusts Act]”. The consequence of this is that the provisions in the rest of the Trusts Act will not generally apply to arrangements that do not meet the definition of “express trust”. Therefore, such arrangements may still be trusts if they would be recognised as trusts under law other than the Trusts Act. In ss 5(8) and (9), the Trusts Act makes clear that it does not codify trust law and that common law and equity rules can still apply if they are consistent with the Trusts Act and other enactments don’t require otherwise.
108. For present purposes, the tax laws do not specify that the Trusts Act definition of “express trust” be adopted. This means that although a consideration of the definition of “express trust” is likely to assist with and influence determining what is or is not a “trust” for tax purposes, the meaning to be given to the word “trust” in tax legislation is not limited to the meaning given to “express trust” by the Trusts Act. It is still necessary to consider other possible meanings.
109. *Law of Trusts (NZ)* (online ed, LexisNexis NZ, accessed 4 June 2019) contains the following definition (at [1.4]):

A trust has been defined as “an equitable obligation under which a person (‘the Trustee’) having the control of property is bound to deal with that property either:

- (a) for the benefit of definite persons (of whom the trustee may be one) and any one of whom may enforce that obligation; or
- (b) for some object or purpose permitted by law.” (*Garrow and Kelly’s Law of Trusts and Trustees* 7th ed, LexisNexis, Wellington, 2013) at [1.1])

Trusts can arise in the following ways (*Garrow and Kelly* at [2.5])

- **An express trust**

A person (the settlor) creates an obligation during his or her lifetime. This is often done by the execution of a deed which names the settlor, trustees and beneficiaries and directs how the trust is to be administered.

- **An implied or presumed trust**

The intention to create a trust has not been expressed but is implied or presumed from the circumstances. This includes resulting trusts where property is transferred to trustees for a specific purpose and when the purpose is fulfilled there is a surplus left over. The trustees then hold this surplus for the creator of the trust.

- **The operation of law**

For example, constructive trusts, or in the case of an intestacy under the Administration Act 1969. In this case an intention to create a trust is imposed by the Court despite the fact that the person in whom the property is vested at the time had neither expressly nor impliedly undertaken any trust.

110. *Law of Trusts (NZ)* also notes (at [1.5]) that “For an express trust to be valid the following three certainties must exist”: certainty of intention (to create a trust), certainty of subject matter (“there can be no trust without property”) and certainty as to the object of the trust (it must be clear who is intended to benefit and to what extent).
111. The following are described (at [1.6]) as “essential structural elements”:
- There are four essential structural elements of a trust: (*Garrow and Kelly*, at [1.26])
- (1) **There must be a trustee.** If no trustee has been appointed or the trustee dies, refuses to act or is unable to act, then the Court will appoint someone to fill that office. Section 51 of the Trustee Act 1956 sets out a number of circumstances in which the Court will appoint a new trustee. There are however some circumstances in which a person nominated for the purpose in the trust instrument may appoint new trustees (see s 43).
- (2) **There must be property of a nature capable of being settled on a trust.** It can be real or personal but it must be alienable at law.
- (3) **There must be a beneficiary or beneficiaries.** A trustee can be a beneficiary, but must not be the only beneficiary.
- (4) **There must be an obligation on the trustee to deal with the property for the benefit of the beneficiaries.** The obligation is an equitable one. [Bold emphasis added].
112. It can be noted that these descriptions of the legal concept of a trust appear materially very similar to the definition of “express trust” in the Trusts Act. It could therefore generally be expected that an arrangement that meets the Trusts Act definition of “express trust” would also be a trust for tax purposes while an arrangement that does not have the characteristics listed in s 13 of the Trusts Act would be highly likely not to be a trust for tax purposes. However, while it may reflect the current state of equity and common law on the concept of a trust and therefore influential, it is possible that court decisions in the future may move from the Trusts Act position so it should not be taken as **determining** whether an arrangement is a trust for tax purposes.
113. *NZ Trusts and Asset Planning Guide* (online looseleaf ed, CCH New Zealand, accessed 4 June 2019) notes (at [120–201]) that whether a trust arises is to be determined objectively:
- It is not necessary that at the creation of a trust, the settlor or testator should appreciate that their acts or words have the legal consequences inherent in a trust, for it to be valid. The assessment has been held to be an objective one, so that **where a transaction objectively appears to be a trust, it will be held to be a trust**, even if it is unclear whether the settlor actually intended for there to be a trust, and the settlor’s ignorance of the law of trusts would not necessarily be determinative: *Ochi v Trustees Executors Ltd* (2009) 2 NZTR ¶19-044 (HC) at [30]. [Emphasis added].
114. The position under New Zealand law (generally and under the Trusts Act) is, therefore, that a trust is not an entity but a description of an equitable obligation the law imposes on a person holding property to deal with that property in a certain way; namely, for the benefit of beneficiaries or a charitable purpose. Circumstances will be found to give rise to a trust only where there is such a person (the trustee), property that can be the subject of the trust, someone (a beneficiary) for whose benefit the property is held and where the law imposes the required obligation. It is an objective exercise to determine whether a trust exists.

115. The legal concept of a trust is consistent with dictionary meanings for present purposes. No other concept would be commonly understood to be a “trust”, in New Zealand at least. Other countries that have the concept of a trust have similar requirements for identifying arrangements as trusts. These circumstances suggest that the legal concept of a trust is likely to be what is intended generally in the trust rules in the Act when the word “trust” appears.
116. These circumstances also suggest that the natural and ordinary meaning of “trust” in the tax legislation is along the lines of what would be held to be a trust under New Zealand law; that is, a trust is not an entity but a description of the obligations and duties on persons who hold property for the benefit of other persons.
117. The trust rules include, relevantly, subpart HC, which contains most of the provisions concerning taxing trusts and distributions from trusts. Section HC 1(1) describes what these provisions do:
- (1) This subpart, together with the trust rules,—
 - (a) provides for the taxation of distributions from trusts, for this purpose defining—
 - (i) beneficiary income:
 - (ii) a taxable distribution:
 - (b) provides for the taxation of trustee income:
 - (c) classifies trusts into the following 3 categories for the purposes of determining the treatment of distributions that are not beneficiary income:
 - (i) complying trusts:
 - (ii) foreign trusts:
 - (iii) non-complying trusts:
 - (d) determines who is a settlor, and sets out their income tax liability:
 - (e) sets out the treatment of trusts settled by persons becoming resident in New Zealand.
118. In s HC 1(1)(c), trusts are said to be classified into three categories for the purposes of deciding the tax treatment of distributions (that are not of beneficiary income). Section HC 9 classifies a trust at the time of distribution:
- A trust is classified at the time it makes a distribution as—
- (a) a complying trust under section HC 10:
 - (b) a foreign trust under section HC 11:
 - (c) a non-complying trust under section HC 12.
119. There is no fourth category of “trust” that is not a complying, non-complying or foreign trust (other than “dual status” trusts mentioned above at [89] and discussed in [8.14] to [8.47] of IS 18/01). Each category is a classification of a trust, so this does not address whether something that would not be a trust according to New Zealand trust law, should be a trust for the purposes of the trust rules.

120. However, nothing in the legislative context appears to suggest that the word trust is intended to have a special meaning when it is used in the sections dealing with “foreign trusts” or that there needs to be anything expressly describing something as a trust for there to be a trust. If the surrounding circumstances, considered objectively, show there is an arrangement with the essential features of a trust under New Zealand law, the property should be regarded as held on trust for the purposes of the trust rules.
121. This intention as to meaning can be illustrated by considering what the trust rules would clearly apply to and why. It is uncontroversial, for instance, that the trust rules apply to real estate situated in New Zealand held by someone on the terms of a trust deed, whether a New Zealand resident or not, and who holds it for the benefit of someone else. This is so whether the property is held for beneficiaries who are resident or not. The property would be regarded as held in trust for the beneficiaries under New Zealand law, and there could be no argument about the arrangement being treated as a trust that is subject to the trust rules. If there is a New Zealand settlor, then it would not be a foreign trust, but it would still be a trust.
122. The same applies to foreign property held by a foreign trustee. Provided there is a New Zealand resident beneficiary, distributions to New Zealand beneficiaries can be taxable if they satisfy the criteria in the relevant provisions of the Act. The location of the property, the settlor or the trustee need not make a difference.
123. Many of the provisions in the Act that are applicable to “foreign trusts” can be taken to assume that property in foreign jurisdictions can be subject to a “trust” or that New Zealand-situated property can have duties owed in respect of it by persons (trustees) wherever they might be resident (although the settlor must not be a New Zealand resident). For these provisions to have meaningful effect, it must have been intended that the “trust” concept not be limited simply because another jurisdiction might not have the same rules as to what is a trust or how they operate, or any rules for that matter.
124. It is New Zealand tax law that is being applied to a “taxable distribution from a foreign trust” and New Zealand tax law (the trust rules) that is being interpreted. It is, therefore, appropriate that it should be the New Zealand law concept of a trust that is applicable; that is, what is a trust according to the law of this country. Otherwise, any situation that would clearly be a trust under the law here could be argued not to be subject to the trust rules because the laws of another country would not recognise the situation as a trust.
125. Consistent with this is a proposition put forward in *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at 544, that a “term is presumed to have its ordinary meaning in the territory to which an enactment extends, even if it applies in relation to a foreign context”. This is discussed in a comment (at 545) following the proposition:

Difficulty may arise where a court is asked to construe an enactment which uses English words but applies in relation to a foreign context where the words have a different meaning. The presumption is that the words should be given ‘their ordinary meaning in the English language as applied to such a subject-matter’ (*Clerical, Medical and General Life Assurance Society v Carter (Surveyor of Taxes)* (1889) 22 QBD 444 per Lord Esher MR at 448). Here the reference to the English language means that language as understood in the territory to which the enactment extends.

126. Identifying whether a distribution comes from a trust would seem to be a similar question to identifying whether an enterprise is a body corporate so as to be a "company", a defined term for New Zealand tax purposes. Professor John Prebble, in "Recognition of foreign enterprises as taxable entities", *Cahiers de Droit Fiscal International* Vol LXXIIIa (1988): 493 at 496, summarised what he considered should be the analytical steps to determine whether an entity organised under foreign laws met the requirements to be a company:
- That is New Zealand would refer to the foreign law to determine the nature of the entity, but would characterise the entity according to its own notion of what is, and of what is not, a body corporate. The question as to whether the participators were shareholders or partners, and, if the former, whether they had derived a dividend, would follow, more or less automatically, being determined in the same manner, by reference to rights and duties established pursuant to the foreign law, but characterised according to New Zealand law.
127. The cases of *C L Dreyfus v IRC* (1929) 14 TC 560 (CA) and *Ryall v The DuBois Company Ltd* (1933) 18 TC 431 (CA) are examples of the courts, for English revenue law purposes, giving significance to the way the law applies in a foreign jurisdiction. In the former case, the separate legal personality of an entity in France meant it was not a "partnership" for the purposes of the Income Tax Act, 1918 (UK). In the latter case, the court considered the German entity in question had similar attributes and was the same in nature as an English limited company. The decision was, therefore, that amounts received by the taxpayer in England were income from "stocks" or "shares" despite coming from an entity that was incorporated in a different jurisdiction.
128. In the Canadian case of *Sommerer v The Queen* (2011) TCC 212, the Tax Court of Canada considered that determining whether a foreign arrangement (an Austrian "foundation") should be treated as a trust required identifying the essential elements of a trust under Canadian law and comparing the elements of the foreign arrangement with those elements. On appeal [(2012) DTC 5,126], the Federal Court of Appeal reached a conclusion in the case on different grounds but did not take substantive issue with the lower court's approach on this point, preferring to express the test in terms of the property in question being subject to conditions that are "analogous to the legal and equitable obligations of a trustee in a common law jurisdiction".
129. Conflict of laws principles may also offer some guidance. In *Dicey and Morris on the Conflict of Laws* (13th ed, London, Sweet & Maxwell, 2000), it is suggested that academic opinion favours a "domestic law of the forum" (or *lex fori*) approach as a solution to the problem of characterising the question to be decided and which law to apply. The following is said at [2.009]:
- If the forum has to characterise a rule or institution of foreign law, it should inquire how the corresponding or most closely analogous rule or institution of its own law is characterised, and apply that characterisation to the foreign institution or rule.
130. Unless an anti-avoidance provision applies, it is the true nature of the legal arrangements actually entered into and carried out that will determine the tax consequences and not their substance or what name the parties give to an arrangement: *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694 (CA).

131. As noted above, the legal arrangements can include the rights and obligations arising for the parties under the laws of a foreign jurisdiction. It does not follow, however, that all arrangements treated as valid trusts in a foreign jurisdiction will be trusts for New Zealand tax purposes, or vice versa. Moreover New Zealand is not a signatory to the Hague Convention and consequently is not obliged to recognise the existence of a trust because it is seen as such in a foreign jurisdiction.
132. Each situation requires analysis to determine whether it would give rise to a trust for New Zealand law purposes taking into account the rights and obligations arising under foreign law. For example, it may be an appropriate conclusion that an arrangement is not a trust because of the degree of control the settlor retains over trust property, including having it returned to the settlor or where a settlor/trustee has no accountability for what would otherwise be considered a breach of trust.
133. That successful arguments can sometimes be made that arrangements, described as trusts in documents, may not be treated as effective trusts can be illustrated by *Re the AQ Revocable Trust, BQ v DQ* [2010] 13 ITEL 260 (a trust valid under United States (US) trust law but not recognised as a trust by a Bermudan court) and *Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) (a UK decision where “trust” deeds establishing New Zealand foreign trusts allowed a former Russian oligarch to retain his beneficial ownership of assets and so were either bare trusts for his benefit or were a sham).
134. For the above reasons, it is, therefore, considered that the word “trust” is used in the Act to refer to the situation where the true nature of the arrangement is that there is a legal obligation of a particular type on someone who holds property for the benefit of a person or object. Whether such an obligation exists turns on there being circumstances that give rise to something that has the essential features of a trust under New Zealand law; namely that a person (trustee) holds trust property and has a fiduciary obligation to deal with the property for the benefit of the beneficiaries or for a charitable purpose. Wherever in the world property is situated, if the legal basis on which it is owned or controlled and the surrounding circumstances are such that there are obligations that New Zealand law would recognise as trust obligations, then a trust exists for tax legislation purposes.

Beneficiary income and taxable distributions from foreign trusts

135. Having identified that money or property comes from a trust, the next question is whether anything is taxable in the hands of the recipient. This will depend on whether anything is “beneficiary income” and whether there has been a “distribution” and whether that distribution is a “taxable distribution” from a “foreign trust”.
136. *Interpretation Statement IS 18/01: Taxation of Trusts – Income Tax* (Inland Revenue, 2018) contains the following description of “beneficiary income”:
- 5.5 “Beneficiary income” is defined in s HC 6 as “income” derived in an income year by a trustee to the extent to which it:
- (a) “vests absolutely in interest” in a beneficiary of the trust in the income year; or
 - (b) is “paid” to a beneficiary in the income year or within the extended time period described in s HC 6(1B).

137. A “distribution” is defined broadly in the Act and in terms of a transfer of value. IS 18/01 discusses this:
- 8.7 A trustee makes a “distribution” when the trustee “transfers value” to a person because the person is a beneficiary of the trust (s HC 14).
 - 8.8 “Transfers value” is defined in s YA 1. It is a net concept in the sense that it takes into account the market value of what is provided by, in this context, the trustee and the market value of what (if anything) is provided in return by the beneficiary. The definition is discussed in detail from [2.20] in the context of the definition of “settlor”.
138. IS 18/01 paraphrases the definition of foreign trust (at [8.39]): “Foreign trusts are trusts that have not had a New Zealand resident settlor at any time since 17 December 1987”.
139. In general terms, a “settlor” is anybody who has transferred value to a trust without getting something in return. Therefore, it will be important to know the background and where the property in the trust in question came from to determine whether it is a foreign trust. Under s HC 11, a trust will be a “foreign trust at a moment in time if no settlor is resident in New Zealand at any time in the period that starts on ... the date on which a settlement was first made on the trust; and ends with the moment in time”.
140. An amount of beneficiary income will be taxable to a New Zealand resident no matter what type of trust it comes from. Amounts other than beneficiary income that are distributions from a foreign trust will be taxable if they are a “taxable distribution” as defined in s HC 15. IS 18/01 states:
- 8.65 In relation to a foreign trust, a distribution is a taxable distribution to the extent to which it is not a distribution of:
 - (a) an amount that is beneficiary income;
 - (b) a part of the corpus of the trust;
 - (c) a profit from the realisation of a capital asset or another capital gain (other than a capital gain or other capital profit made with an associated person);
 - (d) a foreign superannuation withdrawal;
 - (e) a payment or transaction that represents a distribution of either the corpus of the trust or a capital gain.
141. This legislative framework makes it important to identify how much of the distribution should be treated as corpus, capital and so forth. For this, the ordering rules in s HC 16 need to be applied to every foreign trust distribution that is not beneficiary income or from a trust that is within an exception to s HC 16. As explained from [132], the ordering rules can result in some or all of a distribution being treated as made up of income derived by a trustee. Any current year income will be beneficiary income and will be taxable as that rather than as a taxable distribution, if vested in or paid to a beneficiary in the same year as derived by the trustee or paid to a beneficiary within the extended time allowed by s HC 6(1B).

142. Note: Section HC 15 (in relation to 8.65(c) as referred to in the quotation in [128]) has been changed to modify the associated person exception. The effect of section 209 of the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019 is that distributions will not be taxable distributions just because they are of capital gains realised by the trustee on distributions of property to beneficiaries from a foreign trust or distributions of realised capital gains made when a trustee sells assets to associated parties including beneficiaries. This is effective from 18 March 2019, but if a taxpayer has taken a tax position before 18 March 2019 that is consistent with this change that will be treated as correct.

Ordering rules (section HC 16)

143. The application of the ordering rules is a very important consideration for any taxpayer in determining whether they might have derived a taxable distribution from a foreign trust. The rules may characterise amounts distributed as something different to what the amounts are nominally. In other words, the ordering rules don't have to respect the description a trustee gives to the distribution in question or what the relevant trust deed provides.

144. IS 18/01 outlines the rules and how they work:

- 8.108 Because some distributions will be taxable and some not, opportunities could arise for avoiding or deferring tax on income accumulated in trusts by distributing taxable amounts to non-resident beneficiaries or by distributing non-taxable amounts before taxable amounts. The ordering rules for distributions in s HC 16 limit opportunities for manipulating distributions from foreign and non-complying trusts in this manner. This is achieved by providing a series of ordering rules that determine the order in which amounts are treated as having been distributed from such trusts.
- 8.109 These ordering rules override the treatment of the distributions that would otherwise apply based on the terms of the trust or the exercise of the trustee's discretion. The rules can affect whether a distribution is treated as a distribution of income, a capital gain or corpus, and so determine whether a distribution will be a taxable distribution or not. Therefore, as noted earlier, it is necessary to interpret the definition of taxable distribution and the ordering rules together.
- 8.110 The ordering rules in s HC 16 apply when a trustee of a foreign or non-complying trust makes a distribution to a beneficiary. The four exceptions to the ordering rules are discussed from [8.143].
- 8.111 Where they apply, the ordering rules treat a distribution as being made up of the following elements in the following order:
- (a) income derived by the trustee in the current income year;
 - (b) income derived by the trustee in an earlier income year;
 - (c) a capital gain derived by the trustee in the current income year;
 - (d) a capital gain derived by the trustee in an earlier income year; and
 - (e) the corpus of the trust.
- 8.112 The ordering rules apply on an end of year basis. That is, a distribution is not characterised at the time at which it is made. Rather, distributions are characterised at the end of the income year in which they are made by reference to the total income and capital gains derived in that income year (and previous income years). When the ordering rules are applied, they are applied individually to each distribution made by the trustee in the order in which the distributions are made (subject to potential reordering under s HC 16(5), as discussed from [8.129]).

8.113 The amount of each element (eg, current year income) is finite. Once an amount of an element has been treated under s HC 16 as included in a distribution that amount is no longer available to be treated as included in another distribution. This means that the order in which the distributions are made can be significant.

8.114 For each distribution, the elements must be applied in the order above. The next element is relevant only to the extent that the total of the available amounts in the elements so far considered is less than the amount of the distribution.

145. There are exceptions to the ordering rules. The most important for present purposes is the exception in s HC 16 for “non-discretionary trusts” arising on death. Where this section applies, the source of a distribution is determined by the terms of the trust or the trustee resolution making the distribution. IS 18/01 comments on the non-discretionary trusts exception:

8.146 Section HC 16 does not apply to a distribution if:

- (a) the trust is a “non-discretionary trust”; and
- (b) one of the following applies:
 - (i) the trust was created by will or codicil (an amendment to a will) or by an order of court modifying a will or codicil;
 - (ii) the trust was created on an intestacy or partial intestacy; or
 - (iii) no settlement has been made on the trust after 17 December 1987.

8.147 A “non-discretionary trust” is a trust where the trustee has no discretion to determine the source, nature and amount of distributions to beneficiaries. This means, among other things, that the trustee has no discretion to classify trust property as capital or income.

146. If an exception to the ordering rules does not apply, a beneficiary needs information on the trust’s circumstances and history to be able to apply the ordering rules. Ideally, this information will be in the form of good financial records (modified as necessary to show current year income, accumulated income, capital gains and corpus according to New Zealand income tax law – see IS 18/01 at [8.119]) and should include details of all settlements on the trust, gains in value of trust property and distributions that have been made by the trust, in the year in question and in previous years. In the absence of financial statements, other material and evidence is potentially relevant but the onus is on the beneficiary to prove the elements of a distribution to a satisfactory level of accuracy. In [8.157] of 18/01, it is noted that if there are adequate records relating to corpus but not to income or capital gains, it will still be possible for a final distribution not to be taxable to the extent the amount does not exceed the corpus.

147. Therefore, where s HC 16 and the ordering rules apply, the recipient of a distribution must point to evidence that allows application of the rules. As IS 18/01 notes, if they can’t, the distribution will be deemed to be taxable:

8.155 If the records of a foreign or non-complying trust do not allow an accurate determination of the elements of a distribution under s HC 16 (ie, current and previous year income and capital gain amounts and the corpus of the trust), the distribution is a taxable distribution (s HC 15(7)).

148. The consequences of a distribution being taxable in this way will often justify a concerted effort on the part of a beneficiary to locate the required information. This may be difficult, but the onus is on the beneficiary to demonstrate that the ordering rules apply in the way the beneficiary contends.

149. It should be noted that non-discretionary will trusts may still give rise to taxable distributions when distributing accumulated income and certain capital gains, but the records requirement is not as likely to be an issue as it would be for other trusts. This is because the ordering rules will not apply and it is potentially less complex to determine what has been distributed.

Administration of estates

150. Different countries have different laws for the administration of estates. It follows that the legal basis on which property is owned or controlled may be different too and could lead to a different conclusion on whether a trust arises. However, many countries have laws like the laws in New Zealand, especially common law countries. Therefore, some discussion of the law here in New Zealand relating to the administration of estates is useful to illustrate when a trust (that is not a “bare trust” and ignored for tax purposes – see discussion at [194] below) might arise when a deceased estate is being administered overseas.

New Zealand estate administration and trusts

151. When a person dies, the law determines what happens to the money and property that they owned (their estate) at the date of death. If the deceased died without a will (intestate), the law provides for the appointment of an administrator and succession to the estate (that is, who inherits) after a process of identifying and collecting assets, satisfying liabilities and distributing what is left (the residue). If the deceased made a will, the executors named in the will have the job of identifying, collecting, satisfying and distributing according to the instructions of the deceased in the terms of the will.
152. The instructions in a will may include paying out or distributing legacies or gifts of specific amounts or specific property to named people. These legacies or gifts may be referred to as specific legacies.
153. The instructions in a will may also expressly provide for trusts (testamentary trusts). This might be a direction to executors to hold property on trust for specified beneficiaries or it might be a direction to establish a trust to hold property for specified beneficiaries (for which a trust deed is usually formalised). If a distribution is made from a trust established under such instructions, the Act applies as it would for any distribution from a trust established by a person during their lifetime.
154. Whether the deceased left a will or not, and even for a will that does not expressly instruct for there to be a trust, a trust may still arise at some point. This may be because, for example, heirs are not yet of an age to inherit or there is a life interest..
155. However, a trust does not arise immediately on the death of the deceased. *Tax Implications of Certain Asset Transfers* (Officials' issues paper, Policy Advice Division of Inland Revenue, 2003) describes the legal process in New Zealand for property moving from a deceased person to beneficiaries (at 11 and 12):
- 4.4 On the death of a taxpayer, the estate can be dealt with in several ways, depending on whether a will exists and, when a will does exist, the taxpayer's intentions as set out in the will (for example, whether there are to be a trust, legacies, and so on). Normally, it takes one to two years to wind up an estate and distribute the assets to the beneficiaries. There are several discrete points in this process at which a property disposition could be deemed to have

occurred – on death, on transfer from executor to trustee, or on distribution to legatees and beneficiaries.

- 4.5 A will usually provides for the appointment of one or more executors. In the absence of a will, a court will appoint someone to administer the deceased's estate. **Legal and beneficial ownership of the deceased's property vests in the executors or administrators from the time of death through to the end of the period of executorship or administration. The beneficiaries have a right to have the deceased's estate administered properly during this period but do not, with the exception of specific legacies, have more than an inchoate right in the assets.**
- 4.6 The duties of the executor or administrator are to collect the assets of the deceased, pay all debts, testamentary expenses and taxes and to distribute the legacies. **At the end of the period of executorship or administration, the executor or administrator becomes a trustee of the residual assets on behalf of the beneficiaries.**
- 4.7 Property that has been bequeathed or devised under a will may be gifted as a specific legacy, general legacy or residuary gift. Under the "doctrine of relation back", specific legacies take effect from the date of death, whereas general and residuary legacies vest in the beneficiary(ies) at the time of distribution. [Emphasis added].
156. Other commentaries (and cases, for example, *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694) confirm that, although executors and administrators are subject to fiduciary duties during the period of their executorship or administration, neither the beneficial nor the legal interest in the estate assets (that are not the subject of specific legacies) moves to those who stand to inherit. For instance, *Laws of New Zealand: Trusts Part 1* (online ed, LexisNexis NZ, accessed 18 December 2018), under the title "Introduction to Trusts: Nature of Trusts and of the Trust Relationship", says:
- Personal representatives and trustees.** In a loose sense, a legal personal representative (while acting as such) is a trustee for the creditors and beneficiaries claiming under the deceased, as that personal representative holds the real and personal estate of the deceased for the benefit of the deceased and not for his or her own benefit. Moreover, in the Trustee Act 1956 the term "trust" extends to the duties incidental to the office of an administrator under the Administration Act 1969.
- However, **during the administration of the estate of the deceased, whether a testator, or an intestate, no legatee, devisee, or next of kin has any beneficial interest in the assets being administered**; he or she has merely an equitable right to have the estate administered properly. This right is enforced by means of a devastavit action. [Emphasis added].
157. In England the position is similar. *Williams on Wills* (9th ed, LexisNexis Butterworths, 2008) notes (at [1.8]):
- Although the title to the assets vests in the personal representative and the will is said to take effect in equity only, the property comprised in residue is not held on trust for the beneficiary under the will so as to vest any equitable interest in him. It is in fact a fallacy to seek for the separate existence of the equitable beneficiary interest in the assets during the period of administration. ... Thus the legatee of a share of the residue has no interest in any of the property of the testator until the residue has been ascertained. ... It has been held that this right is in the nature of a chose in action. ... Likewise, persons entitled on intestacy have no interest in the deceased's assets during administration.
158. Being an executor is not the same as being a trustee: *In re Jane Davis, In re T H Davis, Evans v Moore* [1891] 3 Ch 119. *NZ Trusts and Asset Planning Guide* (online looseleaf ed, CCH New Zealand, accessed 4 June 2019) notes (at [123–401]) the difference between the two roles of executor and trustee and refers to authority as to the time at which an executor becomes a trustee:

An executor carries into effect a deceased's will. The duties of an executor include to collect and get in the assets of the deceased, pay expenses and debts and discharge legacies under the will (*Re Branson (Deceased)* (1911) 31 NZLR 79, at p 82). In comparison, the essential duties of a trustee of a trust created under the will are to obtain possession or control of the trust property, get in funds due to the trust estate, preserve the trust property and to secure it from loss or risk of loss and to conform to and carry out the terms of the trust.

"The change in character from personal representative (executor) to trusteeship occurs when the estate has been fully administered, in the sense that all the debts and liabilities have been discharged and the residue ascertained ..." (*Hansen v Young* [2004] 1 NZLR 37 (CA), at para [29]).

159. These comments suggest that, strictly speaking, any trust from which distributions are made to beneficiaries will arise only once the personal representatives are ready to distribute. This is because the law of estate administration in New Zealand is that personal representatives have the legal and beneficial interest in property passing on the death of a person, but they do not hold the legal interest on a trust under which those ultimately entitled to the property have a beneficial interest (or under which they might receive a distribution as a beneficiary of a trust). Such a beneficial interest does not arise, whether for particular property or the residual estate, until the personal representatives have completed their duties in the administration of the estate and there is a transition from the role of personal representative to the role of trustee.
160. This position is not altered by the fact that, under the Act, an executor or administrator is treated as a trustee (specifically, s YA 1 defines "trustee" to include an executor or administrator). Although a personal representative is to be considered a trustee for tax purposes, it does not follow that a trust arises on death or during administration. It just means that provisions referring to "trustee" may have a broader application than they otherwise would. Where a section refers to "trust" but not "trustee", interpretation of the section requires consideration of the meaning to be given to the word trust. As noted, this would not generally include an estate during administration.
161. A personal representative will become a trustee at the point at which they have identified the residue of the estate and assent to the property in the estate becoming subject to a trust: *Re McGregor (deceased)* [1960] NZLR 220 at 229 (CA). The dispositions in the will become operative on such assent: *George Attenborough & Son v Solomon* [1913] AC 76 (HL).
162. Such assent can happen for property outside of residue and at different times for different property. The commentary in *Laws of New Zealand: Trusts Part 1* set out above continues:

When the personal representatives realise that specific property left on trusts is not going to be resorted to to enable debts, expenses, and liabilities to be satisfied, they may assent to that property being held on trust in the strict sense. It is often important to determine when a personal representative has completed his or her functions as such in relation to any property and holds the property solely as a trustee in the strict sense; this is because there are differences in the powers of personal representatives as such and trustees, and also the period of limitation applicable to an action may depend in certain cases upon whether the defendant holds the property which is the subject of the claim as personal representative or as trustee. Moreover, as the duty of personal representatives is owed to the estate as a whole, they, unlike trustees, do not have to hold the balance evenly between those interested in income and those interested in capital. [Emphasis added].

163. More explanation of “assent” can be found in *Laws of New Zealand: Administration of Estates II – Assents* (online ed, LexisNexis NZ, accessed 4 June 2019):

457. Necessity for assent. The bequest of a legacy, whether general or specific, or of real estate transfers only an inchoate property to the legatee: the executor's assent is necessary to render it complete and perfect. The right is one which devolves on the legatee's personal representatives should the legatee die before the assent is given. In the case of a release of a debt by will, the executor's assent is necessary, as the release in effect amounts to a legacy of the debt.

The necessity for assent by an executor applies to residuary bequests and to interests arising under a partial intestacy. An executor may assent to part of a residuary gift without assenting to the whole. The assent of one of several representatives to a bequest of pure personalty is sufficient; even though the bequest is to that representative. An executor may assent before probate. The assent will not be affected by their dying without having obtained probate, provided the will is subsequently proved. An executor may be compelled by the legatee to assent should they refuse to do so without just cause. [Emphasis added].

164. The assent need not be in any particular form and it is a question of fact whether assent has occurred:

459. Assent by implication. An assent to the vesting of real or personal estate may be express or implied; it need not be in writing nor need it be given in any particular form. Informal expressions, if sufficiently clear to indicate intention, may amount to an assent. The assent may also be implied from the executor's conduct: thus, the application in the maintenance of minors, of rents of leaseholds bequeathed to the executor in trust for maintaining them during minority, and afterwards in trust for the legatee on attaining their majority; allowing a legatee of a term to receive the income; the payment by the executor of rent, coupled with the charging of the legatee with the payments in account; or the payment of a charge subject to which a legacy is given; would amount to an assent to the bequest. However, an executor may, and often does, make general payments to a legatee without binding themselves to an assent; and the Court will not infer an assent in such circumstances unless there is evidence that the executor intended to assent as, for instance, by representations to that effect or by special payments out of or on account of rents to which the legatee would be entitled after assent.

In case of dispute, **the question whether there has been an assent or not is generally one of fact.** An expression which is ambiguous and applies equally to either view is no evidence of an assent. [Emphasis added].

165. The assent, once given in respect of property, vests title to a legacy immediately:

461. Irrevocability and relation back. The assent once given is irrevocable. **The title to a legacy vests immediately upon the assent in the legatee;** so as to enable them to bring an action at law against the executor or any other person in possession of the bequest. The legatee of a specific legacy has the right to recover the intermediate profits of the thing bequeathed. **Where executors who are also trustees under the will have assented, they cease to hold the property as executors and from then on hold it as trustees.** [Emphasis added].

166. The power to assent belongs to a personal representative:

462. Assents in relation to trusteeship. The power to assent is confined to personal representatives. Difficulties can arise as to whether a personal representative who may have fully administered and become a trustee still has power to assent and whether they need to assent in their own favour as trustee. The capacities of personal representative and trustee are not mutually exclusive, and a personal representative who has fully administered the estate and holds the residue as a trustee is not thereby necessarily and automatically discharged from their obligations as personal representative. A personal representative retains their character as such (as distinct from their statutory powers of management) for all

time; or, in the case of a grant of administration for a limited period, until the termination of the period of the grant.

167. One of the ways a personal representative becomes a trustee is when they have assented:

463. When a personal representative becomes a trustee. If property is specifically devised or bequeathed to an executor upon trust they become trustee of it when they have assented; or when they have severed the property from the rest of the estate; or when they have executed a declaration of trust. **As regards residue, the major change in character from representation to trusteeship occurs when the estate has been fully administered in the sense that all debts and liabilities have been discharged and the residue ascertained. When the trusts affecting the residue are designed to continue after completion of the administration, the executor should thereupon execute an assent to the vesting of the residue in themselves as trustee.** [Emphasis added].

168. Further discussion on testamentary trusts, “assent” and related aspects of administration of estates in New Zealand can be found in the cases of *Re Estate Eagle*; *Barbalich v Kennedy* (1997) 1 NZTR 7-003 (HC Auckland M721/97), *Sullivan v Brett* [1981] 2 NZLR 202, and *Re Maguire (deceased)* [2010] 2 NZLR 845.

169. The cases confirm that:

- Until assent, beneficiaries do not have any proprietary interest in residue and residue is not held by the executors on trust in a relevant sense;
- An executor, at some point, either transfers residue to beneficiaries or assents to the vesting of that property in someone, which can include themselves, acting in the capacity of a trustee;
- Assent is evidence that an executor is ready to end their interest in the property in question and it can pass according to the terms of the will;
- Assent can be in respect of particular estate property before residue is ascertained (an inference that assent has occurred can be made from the fact of distribution);
- An express or formal assent is possible although not common in New Zealand;
- Where there has been no formal assent, once administration has got to the point that all debts and legacies have been paid and residue has been “ascertained”, assent can be inferred;
- The only action remaining following assent is for the personal representative to pass legal title to the beneficiaries of the will (or to a trustee to hold for beneficiaries that is to be someone other than the personal representative);
- Whether there has been assent does not turn on what the personal representative believes or intends, it is what the facts demonstrate; .
- If vested in a trustee, the trustee either holds the property on the trusts specified in the will (ie, testamentary trusts) or, if no trusts are specified, on trust according to the beneficiaries’ rights and interests under the will (this will be a bare trust).

170. It seems reasonable to conclude that the certainties required before a trust arises will be present on assent. The existence and identity of property will have been established, as will the beneficiaries. Assent will provide certainty of intention to create a trust.
171. An equitable obligation amounting to a trust, therefore, arises only following assent by the personal representatives to the property in question being held on trust by a trustee or trustees. Such assent can be express or inferred from the circumstances.
172. If laws similar to the laws of administration of estates in New Zealand apply, where a testamentary trust or a life interest or a minority arises from a non-resident deceased's estate, then following assent, the property will be held by a person (trustee) subject to that trust from assent. This may mean an executor changes "hats" (from assent) if they are going to be that ongoing trustee. Such a trust will be a foreign trust because the settlor is the deceased who is not a New Zealand resident and whose intentions to create a will trust are being carried out by the executors (an indirect transfer of value as provided for in s HC 27(4)). To determine the tax treatment of property or amounts transferred to a New Zealand beneficiary, the possibility that what is transferred to a New Zealand resident is a taxable distribution needs to be considered. However, the trust will often not be discretionary so that the ordering rules do not apply (as discussed in [131]).
173. Where a New Zealand beneficiary of a foreign deceased estate has a vested interest after assent, a "bare" trust will arise as a matter of law. As discussed from [173], this situation can be ignored for tax purposes. Although the personal representative will be a trustee according to trust law, they will be a bare trustee. They now hold the property subject to the direction and control of the beneficiary and, for New Zealand tax purposes, the beneficiary is treated as the owner of the property.

Estate administration and trusts in other countries

174. The position outlined above for New Zealand estate administration and trust law is likely to be similar to the position in other common law jurisdictions such as Australia, the United Kingdom and the United States. However, some countries may have materially different laws of succession and administration of estates. As noted earlier, many countries do not have the concept of a trust and have laws different to New Zealand's law governing devolution of property on death. In Switzerland (a civil law country like France and Germany), for example, the entire estate of a person passes automatically by way of direct succession to the heirs on the person's death. This is so whether the deceased dies testate or intestate. Trusts are not recognised as a legal arrangement in Switzerland, although it does recognise the existence of trusts in other countries.
175. This means that the position in such civil law countries is materially different from common law jurisdictions like New Zealand. A trust will not arise on death or following estate administration as the heirs have a vested legal interest immediately on death. There is no "interregnum" when the executor has the legal interest as in common law countries. It also means that transfers by personal representatives in civil law jurisdictions will not be a "distribution" for New Zealand tax purposes because they do not transfer value to heirs. The heirs already own what they inherit.

176. Further, the test discussed above for determining whether a “trust” exists was whether in all the circumstances a trust can be said to arise under New Zealand law. The facts relevant to concluding on that issue will include what legal obligations a person has in relation to property. In that case, the rules of another country as to what happens on death will affect legal obligations in relation to property. The fact that no property vests in a personal representative is critically relevant to the question of the existence or otherwise of a trust under New Zealand law.
177. As noted, a trust is an equitable obligation or set of obligations in respect of property under which a person holds property for the benefit of a person or object. The legal interest is held by one person, the beneficial interest by another. However, where the legal and beneficial interests in property move straight from a deceased to an inheritor, there will be nobody holding the legal interest in property other than the people who stand to inherit it. There will also be nothing that would expressly create a trust, such as a will or trust deed.
178. New Zealand law would not recognise a situation as a “trust” where the situation involves property that is not owned by someone who has obligations to deal with it for the benefit of someone else. The arrangements in civil law countries will not meet the requirements under New Zealand law to be a “trust” in that situation.
179. Depending on the situation in the particular country (and this would always have to be reviewed), it follows, therefore, that an amount distributed to a New Zealand heir from an estate administered in a civil law country, either in the course of or following administration, would not be a “taxable distribution from a foreign trust”. This is because it is not a transfer of value made because the recipient is a beneficiary of a trust.
180. As an example of this, suppose person A acts as administrator of person B’s estate on B’s death in Switzerland, a civil law jurisdiction. After several years, A carries out the instruction in B’s will and transfers the proceeds of the sale of shares in a Swiss company owned by B at his death, to person C who lives in New Zealand. The process of administering and maintaining the estate may have taken several years but a trust will not arise because A did not own the shares and the shares vested in C on B’s death. Therefore, the question of a taxable distribution from a foreign trust does not arise.
181. Likewise, there will be no distribution from a trust when A transfers to C the dividends that have accumulated on the shares during the administration. They will be treated as having been derived by C as taxable income from date of death, with A being a bare trustee, as discussed from [175]. Tax paid in Switzerland may be available as a credit against liability for tax in New Zealand. If C has not returned the dividends for tax in New Zealand, an adjustment to their assessments will be required.
182. The situation is likely to be different where a New Zealand resident receives a transfer from an estate being administered according to laws materially like the succession and administration laws here (for example, the laws in a common law jurisdiction). The transfer may be properly characterised as being “from a foreign trust” because the transferor is someone who has the legal interest in the property and has been holding it for the recipient who has the beneficial interest in it.

183. The outcome would be different if the situation were similar to the example above, but B died leaving a will instructing establishment of a trust for C and the shares, A and B were all in Australia. The Australian laws on trusts and estate administration are like those in New Zealand, so a trust will have arisen once A assented to the shares vesting in a trust (which will not be a bare trust). Then, when a subsequent transfer of the sale proceeds for the shares and of the dividends to C occurs, the transfer would be a “distribution”.
184. In short, in some countries, the legal interest in property devolves directly to inheritors. In others, like New Zealand, the legal interest is vested in someone other than the inheritors for a while. It follows that in the context of inheritance, one relevant circumstance that needs to be considered to determine whether an amount is a distribution from a trust is the effect of applicable laws of other countries.

Effect on tax status of deceased's estate during administration

185. As noted above, in New Zealand a trust will arise only once personal representatives are ready to distribute and have assented. From that point, the beneficiaries have an equitable interest in property subject to a trust, either a bare trust (ignored for tax) or an express or implied trust.
186. Before then, although it seems they are sometimes referred to as holding property “on trust”, the legal position is that they hold both the legal and the beneficial interests in the estate property “in right of the deceased” (see *Nevill's Law of Trusts, Wills and Administration* (12th ed, LexisNexis, 2016) at [19.11.6]). They do not hold interests in the estate as trustee for beneficiaries. Heirs do not have any beneficial interest and can rely on only their right to force the representatives to carry out their duties. It, therefore, seems more appropriate to consider the representatives not (yet) to be trustees. This is likely to be the position for deceased estates in common law countries in general but unlikely to be the position in civil law countries.
187. As a result, a New Zealand tax resident will not derive anything that will be beneficiary income or a taxable distribution from a foreign trust unless:
- for common law countries, administration of an estate has at least reached the stage that personal representatives have assented to the property being held on trust; or
 - for civil law countries, something has happened to the property before transfer to the resident that New Zealand law would consider gives rise to a trust (for instance, the property was transferred to someone in another country (a common law country) to hold on trust for the resident in New Zealand - a distribution made direct to the resident would not be a distribution from a trust).

Bare trusts

188. Commentary referred to above also suggests that a trust can still arise by assent even though the personal representative has not got to the point of identifying the residuary estate. For instance, an executor may choose to distribute a specific legacy to the person named in the will as entitled to that legacy. Assent in relation to the property or amount forming that specific legacy would be inferred once the distribution is made and, technically, there might be a brief time when what is distributed is subject to a trust under general law. This situation would not give rise to a taxable distribution, however. This is for two reasons.
189. The first reason is because if it were a distribution from a foreign trust, it would be a distribution of corpus, being a specific legacy distributed from a specific non-discretionary trust created by will (and so excluded from the ordering rules in s HC 16 by s HC 16(6)(b)).
190. The second reason is because not every distribution that would otherwise meet the legislative definition of “taxable distribution” will necessarily be a “taxable distribution from a foreign trust”. If the property is held on a “bare trust”, s YB 21 would have the effect of deeming no distribution to have been made by the person holding the property. Section YB 21 provides:

YB 21 Transparency of nominees

Treatment of nominee

- (1) In this Act, unless the context otherwise requires, **if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.**

Who is a nominee?

- (2) A person holds or does something as a nominee for another person if the person acts on the other person’s behalf. **However, a trustee is a nominee only if the trustee is a bare trustee.**

Nominal settlements

- (3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement. [Emphasis added].

191. In practical terms, and in the context of trusts arising in the administration of estates, the consequence of a trust being “bare” is that inheritors would not derive beneficiary income or taxable distributions but they would derive any income from the property in question.
192. The principles developed through the courts on what amounts to a “bare trust” are summarised in “Interpretation Statement IS 12/01: Income Tax – Timing of Share Transfers for the Purposes of the Continuity Provisions” *Tax Information Bulletin* Vol 24, No 7 (August 2012): 20:
112. Three principles can be distilled from these authorities:
- A “bare trustee” is a person who holds property on trust for the absolute benefit and at the absolute disposal of other persons, and has no beneficial interest in the property.
 - A “bare trustee” does not have any duties to perform in regard to the property, except to convey or transfer it to a person entitled to hold it when required to do so.

- For a bare trust relationship to exist, the three certainties of a trust must be satisfied.

193. "QB 16/03: Goods and Services Tax – GST Treatment of Bare Trusts", *Tax Information Bulletin* Vol 28, No 5 (June 2016): 16 describes a "bare trust" as:

5. A bare trust is a type of trust under which the trustee holds property on trust without any duties to perform other than to convey the trust property to the beneficiary or as the beneficiary directs. The reference to "duties" in this definition is to duties that the settlor has specified. For example, the trustee may have been appointed to hold the property as nominee, or the settlor may have required that the beneficiary be maintained until becoming entitled to call for capital and income on reaching the age of majority. Once the beneficiary reaches the age of majority, the trustee no longer has a duty to maintain the beneficiary. In both situations, the trustee is "bare" of any duties specified by the settlor. However, so long as a trustee holds property on trust, they always retain their legal duty to take reasonable care of the trust property. The trustee cannot escape this duty: *Herdegen v FCT* 88 ATC 4995 (FCA); *Waters' Law of Trusts in Canada* (4th ed, Carswell, Toronto, 2012) at 33–34.
6. Therefore, a bare trustee has not only a duty to transfer the trust property to the beneficiary (or as directed by the beneficiary), but also a legal duty to take reasonable care of the trust property in the meantime: *Herdegen*; *CGU Insurance Ltd v One Tel Ltd (in liquidation)* [2010] HCA 26; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (CA); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697.
7. What a bare trustee must do to fulfil their duty to protect trust property depends on the nature of the trust property and any threats to the trust property. However, a bare trustee must refrain from active management that does not fall within the duty to maintain the trust property: *Bruton Holdings Pty Ltd (in liquidation) v FCT* (2011) 193 FCR 442 (FCAFC).

194. The question, for s YB 21 purposes, will be whether a bare trustee (assuming that is the appropriate legal characterisation of someone's capacity) "acts on behalf of" the beneficiary. This will depend on the circumstances, but it would be unusual for someone holding property on a bare trust not to be acting on behalf of the person for whom the property is held.

195. In the context of estates, a trust will, therefore, arise only on completion of the personal representative's role in relation to property and on the personal representative assenting in relation to that property. Then it will depend on the facts as to what is being distributed, and whether any transfer of the property to an heir is a transfer by a bare trustee. In that case, the trust rules will not apply because for tax purposes there is no trust. The beneficiary, not the trustee, is treated by s YB 21 as holding the property from the date of assent. If, on the other hand, the personal representative is more than a bare trustee, the transfer (or part of it) might be of beneficiary income or a taxable distribution to the extent it is not excluded by the application of s HC 15.

Consequences of an arrangement being a trust

196. A trust technically arises under the general law of many common law countries on assent.

197. The trust that arises following assent and before distribution will often be a bare trust that will not be recognised as a trust for tax purposes. A transfer of property to a New Zealand resident will, therefore, often not be a taxable distribution. This would be the case if the property continued to be held for a time because of practical difficulties in locating the beneficiary or transferring the property to them. During that time, the property would have been held for the absolute benefit of the beneficiary, who has the right to call for the property at any time and the trustee must act on that direction.
198. An administrative delay, following payment of all debts, in selling property in order to distribute the proceeds of sale to heirs would not follow assent so would not give rise to a taxable distribution. Another situation that might hold up assent would be where the will is contested or there is a claim on the estate. There will be a delay in sorting out who is entitled to the property, but it would be the personal representatives dealing with that in their capacity as representatives, not as trustees. They would not give assent for property affected by the contest or claim until the contest or claim were sorted.
199. However, if an executor continues to hold property in the capacity of trustee on a trust, expressly or impliedly, provided for in a will, and the trust is not a bare trust, then any transfer to beneficiaries may be a taxable distribution. Assuming an assent is express or can be inferred from the circumstances, a distribution when it is made might then give rise to a taxable distribution. This would be where, for instance, heirs of an intestate deceased are not of age or where a will provides for a life interest before the property goes to the heirs. In these situations, there will be contingencies and more than protection of the property before distribution, so there will not be a bare trust.
200. In the example discussed at [168], of an executor in Australia distributing the proceeds of sale of Australian shares to a New Zealand resident heir of a deceased Australian, the distribution was from a foreign trust. This is because the proceeds were part of the residuary estate that was held undistributed by the executor for a time. The deceased had died with a will that expressly provided for a trust to be established for the heir so a trust arose following assent. The ordering rules in s HC 16(2) would need to be considered, unless the trust was a non-discretionary trust covered by s HC 16(6)(b).
201. Assuming it was a discretionary trust, if the trust records were not good enough to allow application of the ordering rules, the transfer of the proceeds of sale of the shares and the accumulated dividends would together be a taxable distribution: s HC 15(7). If the records showed that only the accumulated dividends represented income derived since the trust started, then they would not be excluded from being a taxable distribution by s HC 15(4), but any capital gains made on the shares by the trust and their value when the trust started (corpus) would be excluded and would not form part of the taxable distribution.

Summary

202. Common law countries are likely to have similar estate administration laws to those in New Zealand. This means that personal representatives, in that capacity, do not hold the property of a deceased person on trust for the heirs. Property will be subject to a trust only when personal representatives hold legal title subject to the terms of a trust, express or implied. This can happen only after they have given assent in relation to that property. Assent can be inferred from the circumstances and can be for individual items of property and before the residuary estate has been determined. Before such assent, the legal position is that the personal representatives hold both the legal and the beneficial interest in the estate property "in right of the deceased" rather than as trustee for beneficiaries.
203. A trust under general law and following assent can still arise for property distributed upon completion of administration. However, in a straightforward will disposition, such a trust is likely to be a bare trust that will not be a foreign trust for tax purposes and any distribution will not be a taxable distribution. Alternatively, where there is a testamentary trust or a will providing for life interests or no distributions to heirs who are minors, the property may continue to be held in trust and may be a taxable distribution when transferred to beneficiaries. A distribution in these circumstances could comprise more than corpus and could be subject to the ordering rules in s HC 16 as well as comprising current year or beneficiary income.
204. Distributions from estates of residents of civil law countries are less likely to be from trusts because heirs have a legal interest from the date of death.

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assent
bare trust
beneficiary income
distribution
ordering rules
taxable distribution
trust

trustee
trustee income

Legislative references

Income Tax Act, 1918 (UK)
Income Tax Act 2007, ss BD 1, BF 1, CV 13, subpart HC, YA 1 ("trustee"), YB 21
Interpretation Act 1999, s 5(1)
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Appendix B – Legislation

Income Tax Act 2007

Section BD 1 provides:

BD 1 Income, exempt income, excluded income, non-residents' foreign-sourced income, and assessable income

Amounts of income

- (1) An amount is income of a person if it is their income under a provision in Part C (Income).

Exempt income

- (2) An amount of income of a person is **exempt income** if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions).

Excluded income

- (3) An amount of income of a person is **excluded income** if—
- (a) it is their excluded income under a provision in subpart CX (Excluded income) or CZ; and
 - (b) it is not their non-residents' foreign-sourced income.

Non-residents' foreign-sourced income

- (4) An amount of income of a person is non-residents' foreign-sourced income if—
- (a) the amount is a foreign-sourced amount; and
 - (b) the person is a non-resident when it is derived; and
 - (c) the amount is not income of a trustee to which section HC 25(2) (Foreign-sourced amounts: non-resident trustees) applies.

Assessable income

- (5) An amount of income of a person is **assessable income** in the calculation of their annual gross income if it is not income of any of the following kinds:
- (a) their exempt income;
 - (b) their excluded income;
 - (c) their non-residents' foreign-sourced income.

Section BF 1 provides:

BF 1 Other obligations

A person must pay the following types of income or ancillary tax under the relevant Part:

- (a) qualifying company election tax under Part H (Taxation of certain entities):
- (b) income tax on taxable distributions from non-complying trusts under Part H:
- (c) further income tax under Part O (Memorandum accounts):
- (d) RLWT under subpart RL (Residential land withholding tax), if the person is described in section RL 2 (Vendors: who must pay, and how?):
- (e) *[Repealed]*

Section CV 13 provides:

CV 13 Amounts derived from trusts

An amount derived by a person is income of the person if it is—

- (a) beneficiary income to which sections HC 6 (Beneficiary income) and HC 17 (Amounts derived as beneficiary income) apply; or
- (b) a settlement on trust of property of the kind described in section HC 7(3) (Trustee income); or
- (c) a taxable distribution from a foreign trust to which section HC 18 (Taxable distributions from foreign trusts) applies.

Section HC 1 provides:

HC 1 What this subpart does

What this subpart does

- (1) This subpart, together with the trust rules,—
 - (a) provides for the taxation of distributions from trusts, for this purpose defining—
 - (i) beneficiary income:
 - (ii) a taxable distribution:
 - (b) provides for the taxation of trustee income:
 - (c) classifies trusts into the following 3 categories for the purposes of determining the treatment of distributions that are not beneficiary income:
 - (i) complying trusts:
 - (ii) foreign trusts:
 - (iii) non-complying trusts:
 - (d) determines who is a settlor, and sets out their income tax liability:
 - (e) sets out the treatment of trusts settled by persons becoming resident in New Zealand.

Excluded: certain funds and distributions

- (2) The trust rules do not apply to—
 - (a) a unit trust:
 - (b) a group investment fund to the extent to which it is treated as a company under this Act:
 - (c) a Maori authority:
 - (d) a distribution under section HZ 1 (Distributions from trusts of pre-1989 tax reserves).

Disclosure requirements: non-resident trustees

- (3) Section 59 of the Tax Administration Act 1994 requires the disclosure of a settlement on a trust with a non-resident trustee.

Avoidance arrangements

- (4) Section GB 22 (Arrangements involving trust beneficiary income) may apply to treat a beneficiary as receiving property, or enjoying services or benefits, in fact received, or enjoyed, by another person.

Superannuation funds entering trust rules

- (5) A superannuation scheme that is treated as a company because it is a unit trust and then becomes a superannuation fund is treated as—
- (a) liquidated under section CD 12 (Superannuation schemes entering trust rules) immediately before the date on which it becomes a superannuation fund; and
 - (b) no longer a company.

Section HC 9 provides:

HC 9 Classifying trusts

A trust is classified at the time it makes a distribution as—

- (a) a complying trust under section HC 10;
- (b) a foreign trust under section HC 11;
- (c) a non-complying trust under section HC 12.

Section HC 15 provides:

HC 15 Taxable distributions from non-complying and foreign trusts

When subsection (2) applies

- (1) Subsection (2) applies for a trust that is a non-complying trust at the time a distribution to a beneficiary is made.

Taxable distributions: non-complying trusts

- (2) The distribution is a **taxable distribution** to the extent to which it is not a distribution of—
- (a) beneficiary income; or
 - (b) a part of the corpus of the trust; or
 - (c) a payment or a transaction that represents a distribution of the corpus of the trust.

When subsection (4) applies

- (3) Subsection (4) applies for a trust that is a foreign trust at the time a distribution to a beneficiary is made.

Taxable distributions: foreign trusts

- (4) The distribution is a **taxable distribution** to the extent to which it is not a distribution of—
- (a) beneficiary income; or
 - (b) a part of the corpus of the trust; or
 - (c) a profit from the realisation of a capital asset or another capital gain; or
 - (cb) a foreign superannuation withdrawal; or
 - (cc) a pension; or
 - (d) a payment or a transaction that represents a distribution of either the corpus of the trust referred to in paragraph (b) or a capital gain referred to in paragraph (c).

Determining amount of gain

- (5) For the purposes of subsection (4)(c),—
- (a) the profit or other capital gain does not include a gain that must be taken into account for the purposes of determining an income tax liability;
 - (ab) if the trustee is not a trustee of a trust referred to in paragraph (ac), the profit or other capital gain does not include an amount of capital gain (the gain amount) that is derived by the trustee through a transaction or a series of transactions if—

- (i) the transaction or series of transactions is between the trustee and an associated person who is not a natural person or corporate trustee; and
 - (ii) the gain amount is greater than the capital gain that the trustee would derive from a transaction at market value:
- (ac) if the trustee is a trustee of a trust, for which a CFC is a settlor and no person is treated as a settlor under section HC 28(3) or (4), the profit or other capital gain does not include an amount of capital gain that is derived by the trustee through a transaction or a series of transactions between the trustee and an associated person:
 - (b) the amount of the profit is determined after subtracting any capital loss that the trustee incurs in the income year in which the amount was derived.

Certain capital gains for trustee of foreign trust

- (5B) For a foreign trust, profit described in subsection (5)(ab) or (ac) is income of the trustee for the purposes of section HC 16.

Amounts not subject to ordering rule

- (6) To the extent to which a distribution is made from a trust that is not a complying trust by disposing of property at less than market value or providing services to a beneficiary at less than market value, the distribution is a taxable distribution and is not subject to the ordering rule in section HC 16.

Inadequate records

- (7) If the records of a trust that is not a complying trust do not allow an accurate determination of the elements of a distribution under section HC 16, the distribution is a taxable distribution.

Section HC 16 provides:

HC 16 Ordering rule for distributions from non-complying and foreign trusts

When this section applies

- (1) This section applies for the purposes of the trust rules when a trustee of a non-complying trust or a foreign trust makes a distribution in an income year to a beneficiary. Subsections (6) and (7) override this subsection.

Order of elements of distribution

- (2) The distribution is treated as consisting of the following elements in the following order:
 - (a) first, an amount of income that the trustee derives in the income year:
 - (b) second, an amount of income, other than beneficiary income, that the trustee has derived in an earlier income year:
 - (c) third, an amount that the trustee derives in the income year from the realisation of a capital asset of the trust or another capital gain and that is not income under section HC 15(5B) for the purposes of this section:
 - (d) fourth, an amount that the trustee has derived in an earlier income year from the realisation of a capital asset of the trust or another capital gain:
 - (e) last, the corpus of the trust.

Order and elements

- (3) In subsection (2),—
 - (a) an amount must not be treated as included in the distribution if the amount has been treated under this section as being included in an earlier or contemporaneous distribution from the trust:
 - (b) the paragraphs are applied in order, and the next paragraph applies only to the extent to which the amount of the distribution is more than the cumulative amounts described in that paragraph and the preceding paragraphs.

Deductions and capital losses subtracted

- (4) For the purposes of subsection (2),—
- (a) in paragraphs (a) and (b), the amount of income is determined after subtracting the amount of a deduction that is taken into account in the income year in the calculation of net or taxable income for the corresponding tax year;
 - (b) in paragraphs (c) and (d), the amount is determined after subtracting the amount of a capital loss that the trustee incurs in the income year.

Transactions that are not genuine

- (5) In the determination of the elements of a distribution to a beneficiary (**beneficiary A**), no amount of income or capital gain derived by the trustee of the trust is treated as distributed to another beneficiary of the trust (**beneficiary B**) if the effect is that some or all of the distribution to beneficiary A would be treated as not being a taxable distribution, unless the distribution to beneficiary B meets all the following requirements:
- (a) it is a genuine transaction entered into and carried out in good faith; and
 - (b) it places the amount beyond the possession and control of the trustee in their capacity as trustee; and
 - (c) it does not itself constitute a settlement.

Exclusions: terms of trust

- (6) This section does not apply to the following distributions which are instead treated as consisting of the amount that reflects the terms of the trust or the terms of the exercise of the trustee's discretion:
- (a) a distribution by the trustee of a complying trust which is treated as exempt income under section CW 53 (Distributions from complying trusts), unless an election to pay income tax on trustee income has been made for the purposes of section HZ 2 (Trusts that may become complying trusts); or
 - (b) a distribution from a non-discretionary trust—
 - (i) created by will or codicil, or by an order of court varying or modifying the provisions of a will or codicil; or
 - (ii) created on an intestacy or partial intestacy; or
 - (iii) on which no settlement has been made after 17 December 1987; or
 - (c) a distribution from a trust, other than a non-complying trust, that is settled by a natural person and for which an election is made under section HC 30(2).

Exclusions: taxable distributions

- (7) This section does not apply to a distribution described in section HC 15(6).

Meaning of non-discretionary trust

- (8) In this section, a **non-discretionary trust** is a trust in relation to which the trustee has no discretion as to the source, nature, and amount of distributions to beneficiaries, including but not limited to the classification of trust property as capital or income.

Section HC 18 provides:

HC 18 Taxable distributions from foreign trusts

An amount that a person derives in an income year as a taxable distribution from a foreign trust is income of the person under section CV 13(c) (Amounts derived from trusts).

Section HC 26 provides:

HC 26 Foreign-sourced amounts: resident trustees

Exempt income

- (1) A foreign-sourced amount that a New Zealand resident trustee derives in an income year is exempt income under section CW 54 (Foreign-sourced amounts derived by trustees) if—
- (a) no settlor of the trust is at any time in the income year a New Zealand resident who is not a transitional resident; and
 - (b) the trust is not—
 - (i) a superannuation fund; or
 - (ii) a testamentary trust or an inter vivos trust of which a settlor died resident in New Zealand (whether or not they died in the income year); and
 - (c) for a foreign trust for which a resident trustee applies for registration within the period (the **application period**) given by section 59C of the Tax Administration Act 1994 and that is registered by the end of the income year (the **post-deadline year**) beginning next after the end of the application period,—
 - (i) the trust has a trust deed; and
 - (ii) the income year ends after the day on which the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 receives the Royal assent; and
 - (iii) for an income year that includes part of the application period or is the post-deadline year, the trust is registered before the end of the post-deadline year and is not deregistered before the foreign-sourced amount is derived; and
 - (iv) for an income year beginning after the end of the post-deadline year, the trust is registered when the foreign-sourced amount is derived; and
 - (v) the trustee complies with the requirements under sections 22, 59B, 59C, and 59D of the Tax Administration Act 1994 that the trustee must meet during the income year; and
 - (d) for a foreign trust to which paragraph (c) does not apply,—
 - (i) the trust has a trust deed; and
 - (ii) the trust is registered at the beginning of the income year; and
 - (iii) the trust is registered when the foreign-sourced amount is derived; and
 - (iv) the trustee complies with the requirements under sections 22, 59B, 59C, and 59D of the Tax Administration Act 1994 that the trustee must meet during the income year.

Time for compliance with requirements

- (1B) For a trustee to satisfy subsection (1)(c)(v) or (d)(iv) for an income year, the trustee must—
- (a) comply in the income year with the requirements referred to in the subparagraph:
 - (b) satisfy the Commissioner that the trustee made reasonable efforts in the income year to comply with the requirements referred to in the subparagraph and corrected the failure to comply within a reasonable period of time after the trustee became aware of the failure.

When subsection (3) applies [Repealed]

- (2) *[Repealed]*

When knowledge offence committed [Repealed]

- (3) *[Repealed]*

Exception [Repealed]

- (4) *[Repealed]*

Section YB 1 provides:

YB 21 Transparency of nominees

Treatment of nominee

- (1) In this Act, unless the context otherwise requires, if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.

Who is a nominee?

- (2) A person holds or does something as a nominee for another person if the person acts on the other person's behalf. However, a trustee is a nominee only if the trustee is a bare trustee.

Nominal settlements

- (3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement.

Tax Administration Act 1994

Section 59B provides:

59B Foreign trust with resident foreign trustee: registration and disclosure

- (1) The Commissioner may register a foreign trust if the foreign trust has a resident foreign trustee and a trustee pays the prescribed fee.
- (2) Resident foreign trustees of a foreign trust must apply to the Commissioner for registration of the foreign trust and pay the prescribed fee.
- (3) A trustee applying for registration of a foreign trust (the **contact trustee**) is responsible for communicating with the Commissioner for the trust and must provide, with the application and fee,—
 - (a) the name of the trust:
 - (b) the date, amount, settlor, and nature of each settlement on the trust that is not a provision to the trustee at less than market value of minor services incidental to the activities of the trust and is made in the period of time ending with the application and beginning with—
 - (i) the date on which the trust is formed, if a trustee is not a natural person or is in the business of providing trustee services; or
 - (ii) the later of the date on which the trust is formed and 30 June 2013, if subparagraph (i) does not apply and a trustee becomes required to register the trust on the date on which the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 receives the Royal assent; or
 - (iii) the later of the date on which the trust is formed and the date that is 4 years before the earliest date on which a trustee becomes required to register the trust, if subparagraphs (i) and (ii) do not apply:
 - (c) the name, email address, physical residential or business address, jurisdiction of tax residence, taxpayer identification number, and connection with the trust of—
 - (i) each settlor who makes a settlement referred to in paragraph (b):
 - (ii) each person with a power to appoint or dismiss a trustee, to amend the trust deed, or to add or remove a beneficiary:
 - (iii) each person with a power to control the exercise of a power referred to in subparagraph (ii):
 - (iv) each person with a power to control a trustee in the administration of the trust:
 - (v) each trustee:

- (vi) for a fixed trust, each beneficiary that is not a minor and each nominee for a beneficiary:
 - (vii) for a fixed trust and a beneficiary who is a minor, the parent or guardian of the beneficiary:
 - (d) for a fixed trust and a beneficiary who is a minor, the name, age, and taxpayer identification number of the beneficiary:
 - (e) for a discretionary trust, details of each beneficiary or class of beneficiary sufficient for the Commissioner to determine, when a distribution is made under the trust, whether a person is a beneficiary:
 - (f) a copy of the trust deed and of each document that amends or supplements the trust deed, and a copy of each document that is the functional equivalent of a trust deed or amending or supplementing document.
- (4) The contact trustee must provide a signed declaration that each person referred to in subsection (3)(c)(i) to (vii)—
- (a) is deceased; or
 - (b) despite the efforts of the contact trustee detailed in the declaration, cannot be located by the contact trustee; or
 - (c) has been informed of, and has agreed to provide the information necessary for compliance with, the requirements relating to the provision of information relating to the trust and persons connected with the trust imposed by all of—
 - (i) the Tax Administration Act 1994:
 - (ii) the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:
 - (iii) the regulations made under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.
- (5) A contact trustee must provide to the Commissioner the details of an addition or alteration to a particular to which subsection (3) refers and any signed declaration under subsection (4) required as a consequence of the addition or alteration.
- (6) A contact trustee who anticipates ceasing to be the person communicating with the Commissioner for the trust must provide to the Commissioner the details of—
- (a) the anticipated date on which the trustee ceases to be the contact trustee for the foreign trust:
 - (b) the email address and physical residential address of the trustee after the anticipated date:
 - (c) the name, email address, and physical residential or business address of the replacement contact trustee for the foreign trust after the anticipated date.
- (7) If a foreign trust has more than 1 resident foreign trustee, each resident foreign trustee is responsible for the performance of the obligations imposed on a trustee relating to registration of the trust, disclosure of information, annual returns, financial statements, and payment of fees.

Trusts Act 2019

Section 5(8) provides:

Interrelationship between Act and common law and equity

- (8) This Act—
- (a) is not an exhaustive code of the law relating to express trusts; and
 - (b) is intended to be complemented by the rules of the common law and equity relating to trusts (except where otherwise indicated or where those rules are inconsistent with the provisions of this Act).

Section 5(9) provides:

Interrelationship between Act and other enactments

- (9) If there is an inconsistency between the provisions of this Act and those of any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.

Section 12 provides:

12 Meaning of express trust

For the purposes of this Act, an **express trust** means a trust that—

- (a) has each of the characteristics set out in section 13; and
- (b) complies with section 14; and
- (c) is created in accordance with section 15.

Section 14 provides:

14 Sole trustee cannot be sole beneficiary

A sole trustee of a trust must not be the sole beneficiary of the trust.

Interpretation Act 1999

Section 5 provides:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.